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E-filed: June 15, 2010

9 UNITED STATES BANKRUPTCY COURT  
10 DISTRICT OF NEVADA

11 In Re:  
12 WES CONSTRUCTION COMPANY,  
13 a Nevada corporation,  
14 HEAVY EQUIPMENT SERVICES, LLC,  
15 A Nevada limited liability company,  
16 TRUCKING SERVICES, LLC,  
17 A Nevada limited liability company.  
18 Debtors-in-Possession

Case No. BK-N 09-52177-GWZ  
Case No. BK-N 09-52178-GWZ  
Case No. BK-N 09-52181-GWZ  
[Jointly Administered under Case  
No. BK-N 09-52177-GWZ]

Chapter 7

19 CONSOLIDATED REPLY OF OFFICIAL  
20 COMMITTEE OF UNSECURED  
21 CREDITORS TO TRUSTEES' AND MB  
22 FINANCIAL'S RESPONSE TO MOTION  
23 FOR ORDER 1) RECONSIDERING  
24 ORDERS APPROVING CHAPTER 7  
25 TRUSTEE'S MOTION TO EMPLOY AND  
26 APPLICATIONS TO PAY STEVE  
27 BENNYHOFF 2) REQUIRING MR.  
28 BENNYHOFF TO DISGORGE FEES  
PAID TO HIM DURING THE CHAPTER  
11 PHASE OF THIS CASE; AND 3)  
PROVIDING FOR THE CONTINUANCE  
OF THE § 1102(a)(1) UNSECURED  
CREDITOR'S COMMITTEE.

Hearing Date: June 21, 2010  
Hearing Time: 2 p.m.

29 Comes now the 11 USC Sec. 1102 Committee of Unsecured Creditors ("Committee") and  
30 unsecured creditors Specialty Equipment Services, LLC, Active Assets Management LLC and

31 WHITE LAW  
32 CHARTERED  
33 LAWYERS  
34 20TH CENTURY BLDG  
35 335 W. FIRST STREET  
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1 Lyle Kibbe, who reply to the Trustee's and to MB Financial's June 7, 2010 Opposition to the  
2 Committee's Motion to Reconsider (hiring of Steve Bennyhoff).  
3

4 STANDING ISSUE

5 The Committee does not here quarrel with MB Financial, NA's ("Bank") second assertion  
6 that, neither the Committee nor its counsel is entitled to compensation from the Debtor's estate  
7 for post-conversion Chapter 7 work. However, as neither the Committee nor its counsel has  
8 applied for compensation for post-conversion work, that the Bank's argument is not at issue.

9 The Committee does quarrel with the Bank's assertion that the moving creditors, including the  
10 Committee, have no standing to insist that the Trustee be represented by disinterested  
11 professionals, as well as with the Bank's assertion that the Committee is without standing to  
12 complain that Mr. Bennyhoff was improperly paid during the Chapter 7 phase of this Case. The  
13 Committee's request for disgorgement of fees Mr. Bennyhoff received in the Chapter 11 comes  
14 well within the duties of the Committee proscribed at 11 USC Sec. 1103, and particularly  
15 subsection 1103(d) (Perform such other services as are in the interests of those represented).  
16

17 The Bank cites to two cases where an Sec. 1102 Committee was allowed to continue to  
18 function following conversion, but claims they are irrelevant (and that they apparently represent  
19 a minority position). In one of them, In re SPM Mfg. Corp. 984 F.2d 1305 (C.A.1 (Mass.),1993),  
20 the 1102 Committee's continuing function was tied to issues carrying over from the Chapter 11  
21 following conversion. That is largely the case here, as the Committee seeks an order requiring  
22 Mr. Bennyhoff to disgorge payments he received as a professional person without Court  
23 approval in the Chapter 11 phase of this Case. It is not much of a leap for the Committee to  
24 pose a similar issue in the Chapter 7 portion of this case, to wit the determination of Mr.  
25 Bennyhoff's status as a professional or a paraprofessional impacts both the Chapter 11 and the  
26 Chapter 7 phases of this Case. Issues relating to the disgorgement of Mr. Bennyhoff's fees in the  
27 Chapter 11 are directly applicable to his qualifications to advise the Chapter 7 trustee.  
28

1 The Committee also notes that the Court, in the unique circumstances of this Case,  
2 contemplated the possible continuance of the Committee:

3 On November 19, 2009, at the hearing before this Court on the Bank's Motion to Convert, this  
4 Court stated:

5 3:15:10

6 I see no reason not to convert. And that does not mean that the equitable subordination  
7 claim disappears as I've already indicated.

8 3:15:20

9 And I understand also what Mr. White would seek to do in terms of allowing the  
10 committee to continue to exist and provide assistance to a chapter 7 trustee. And I think  
11 that's a matter of discussing that with the chapter 7 trustee and the Office of the US  
12 Trustee. And if an agreement can be arrived at that is certainly one avenue. If agreement  
13 cannot be obtained then file the appropriate motion and I'll make that determination.

14 3:15:59

15 I am going to deny without prejudice the application of the committee to retain an  
16 accountant. Because until the determination is made by the chapter 7 trustee how he or she  
17 wishes to proceed I think would be premature at this time. So I'm denying that without  
18 prejudice.

19 "PROFESSIONAL" ISSUE: If Mr. Bennyhoff is a professional, he is not disinterested.

20 If a professional, Mr. Bennyhoff must file an affidavit of disinterestedness (Rule 2014),  
21 something he has so far failed to do. 11 USC Sec. 327(a), Bank.R.Civ.P. 2014. Until he does, it  
22 is impossible to employ the Code's procedures designed to determine whether he is interested.  
23 Rule 2014 puts the burden on the Trustee to prove that any professional he wishes to hire is  
24 disinterested. The procedure being employed by the Trustee in this case (putting the burden on  
25 the creditors to prove that the professional is interested) is not contemplated by the Code.

26 The Trustee referred to Mr. Bennyhoff as a "CPA" in the February 12, 2010 Application to  
27 Hire him.

28 11 USC Sec. 101(1) defines "accountant" as "... an accountant authorized under applicable law  
to practice public accounting...". Black's Law Dictionary (7th Ed) defines "accountant" as:

1 1. A person authorized under applicable law to practice public accounting; a person whose  
2 business is to keep books or accounts, to perform financial audits, to design and control  
3 accounting systems, and to give tax advice.

4 ...

5 and a "certified public accountant" as

6 An accountant who has satisfied the statutory and administrative requirements to be  
7 registered or licensed as a public accountant.

8 The Committee assumed the Trustee was seeking to hire Mr. Bennyhoff as a professional  
9 because

- 10 1. On February 12, 2010, he filed an Application to Employ Mr. Bennyhoff. It cites to no  
11 authority. However, since undersigned knows of nothing in the Code that requires the  
12 court to authorize the hiring of a paraprofessional, the Application was presumably filed  
13 pursuant to Rule 2014 , which applies only to professionals;
- 14 2. The Trustee represented in those Applications that Mr. Bennyhoff was a CPA. In fact the  
15 Application to Employ Mr. Bennyhoff is entitled "Exparte Motion to 1) Employ Steve  
16 Bennyhoff, CPA and 2) Pay Fees."
- 17 3. The invoices (attached as Exhibit 3 to the Brandon Declaration, filed herewith) show  
18 that Mr. Bennyhoff is engaging in the types of activities conducted by accountants in  
19 their capacity as professionals.

20 Reference to the Trustee's Opposition to this Motion to Reconsider also shows that the Trustee  
21 is using Mr. Bennyhoff as an accountant. For example, at page 4, line 16, (tasks still to be  
22 completed) the Trustee indicates that he has asked Mr. Bennyhoff to "Coordinate with R  
23 Construction in preparing the income statement that determines the net profit resulting from Roy  
24 Walker's completion of the utility contracts that were unfinished as of 9/1/09."

25 The Committee was concerned that there was no Affidavit of Disinterestedness filed by Mr.  
26 Bennyhoff in conjunction with the Trustee's Application to hire him. After all this time, one  
27 might conclude that the Trustee is refusing to require Mr. Bennyhoff to file a 2014 affidavit of  
28 disinterestedness. The Trustee instead regularly made periodic exparte applications to pay Mr.  
Bennyhoff. True, the Trustee has now finally filed a Declaration in which Mr. Bennyhoff states

1 that he "believes" himself to be disinterested. However it is not in the form or substance of a  
2 Rule 2014 Declaration. It does not state that he is disinterested, nor does it use the wording  
3 referenced in Rule 2014 ("*... The application shall be accompanied by a verified statement of the*  
4 *person to be employed setting forth the person's connections with the debtor, creditors, any other*  
5 *party in interest, ... their respective attorneys and accountants, ....*"). In addition to stating a  
6 belief, the new Bennyhoff Declaration notes that he and Mike Brandt (one of the persons the  
7 Committee wants the Trustee to investigate - see Committee's May 19, 2010 letter to Trustee,  
8 attached as Exhibit 1 to the Brandon Declaration, filed herewith) interacted on accounting  
9 matters on behalf of sister companies before both came to work for Debtor.  
10

11 The Committee's March 19 letter to the Trustee suggested that the estate might have a cause of  
12 action against the CFO Group (the local accounting firm that did the Debtor's accounting work  
13 and pre-and post-petition). The principal in CFO Group is Dan Allen, CPA. The Committee also  
14 suggested in that letter that the Trustee look into possible preferences made when Mark Smith  
15 was Debtor's acting COO during the pendency of the Chapter 11, and Michael Brandt was the  
16 Debtor's CFO, and, later, a paid Chapter 11 consultant.

17 Attached as Exhibit 3 to the accompanying Brandon Declaration is a page from the Bulls  
18 internet blog which shows that Mr. Bennyhoff, Michael Brandt, Dan Allen and Mark Smith are  
19 all members of a small and apparently exclusive Men's club called the Bulls. This certainly does  
20 not make the Committee comfortable that the Trustee is receiving independent advice from Mr.  
21 Bennyhoff concerning whether a cause of action might exist against Mark Smith, Michael Brandt  
22 and/or Dan Allen.

23 Finally, the Bennyhoff Declaration does not address his involvement in the Chapter 11 phase  
24 of this case, nor how much he was then paid. The first invoice Mr. Bennyhoff filed in the  
25 Chapter 7 phase of this case starts as Invoice "13," leading one to assume that he submitted 12  
26 invoices in the Chapter 11 phase of this case. If he was acting as a professional, having not been  
27 approved by the Court, he should suffer disgorgement, at least so long as no order approving his  
28 hiring in the Chapter 11 Case has been entered. Finally, neither Mr. Bennyhoff nor the Trustee

1 have yet complied with the Committee's request for copies of Mr. Bennyhoff's invoices 15, 16,  
2 17, 18 and 19, all apparently submitted and paid in the Chapter 7 portion of this Case.

3  
4 PARAPROFESSIONAL ISSUE:

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6 If a paraprofessional, Mr. Bennyhoff may not be required to file an affidavit of  
7 disinterestedness (though some level of disinterestedness is apparently required by anyone  
8 working for a trustee - see *Mosser v. Darrow*, 341 US 267, 271 (1951): "These strict  
9 prohibitions would serve little purpose if the trustee were free to authorize others to do what he is  
10 forbidden."). However, if a paraprofessional, Mr. Bennyhoff must be compensated by the  
11 Trustee rather than by the estate. *In re Jenkins* 188 B.R. 416 9th Cir.BAP (Cal.),1995.

12 The *Jenkins* court notes, at page 419:

13 The central question in the this case is what Congress intended the term "trustee's services"  
14 to encompass in enacting the section 326(a) limitation on compensation for such services.  
15 Appellant United States Trustee contends that the term includes both services performed  
16 by the trustee personally and services performed by any paraprofessional assisting the  
17 trustee. Appellee chapter 7 trustee contends that because section 330(a) refers to both  
18 services performed by the trustee and services performed by a paraprofessional employed  
19 by the trustee, the term "trustee's services" in section 326(a) includes only services  
20 performed by the trustee personally.

21 Neither the statutory language nor the legislative history provides any direct answer. The  
22 term "trustee's services" is not defined in either the Code or the legislative history.  
23 Furthermore, although section 330(a) states that it is "subject to" section 326, neither the  
24 Code nor the legislative history explains the relationship between the section 326(a)  
25 limitation on compensation for "trustee's services" and the language in section 330(a)  
26 referring to services "rendered by such trustee ... and by any paraprofessional persons  
27 employed by such person."

28 The courts have split on the issue. A majority of the published decisions hold that section  
326(a) limits the compensation that a trustee may receive for both services performed  
personally and services performed by a paraprofessional.

For the reasons stated below, we agree with the majority view and hold that the term "trustee's services" in section 326(a) includes both services performed by the trustee personally and services performed by a paraprofessional employed by the trustee.

First, the language of section 330(a) treats services performed by paraprofessionals employed by the trustee as a part of the trustee's services. Section 330(a) authorizes payment of compensation only to a trustee, an examiner, a professional person employed under section 327 or 1103, or the debtor's attorney. It does not authorize the estate to pay compensation directly to a paraprofessional. The statutory language regarding paraprofessionals merely permits the compensation paid to the trustee, etc., to be calculated in light of both the services performed by the trustee personally and the services performed by any paraprofessional persons working under the trustee. This approach is consistent with the nature of paraprofessional services. A paraprofessional helps a supervising professional perform professional services. Thus, a paraprofessional working for a trustee is a paratruster, helping the trustee to perform "trustee's services."

## **CONCLUSION**

The Committee and joining creditors respectfully request an order:

1. Declaring whether Mr. Bennyhoff is a professional or paraprofessional.
2. That if Mr. Bennyhoff is a professional,
  1. Bennyhoff disclose the total amount of fees he received prior to Chapter 11 phase and disgorge that amount due to Debtor's failure to obtain Court approval of his employment, unless he obtains such an order, nunc pro tunc, after filing a proper 2014 Declaration of Disinterestedness.
  2. Mr. Bennyhoff and the Trustee comply with the requirement to affirmatively state disinterestedness in the form and manner provided in Fed.R.Bank.P 2014.
  3. Submit fee applications which, as to payment, are on equal footing with all professionals in this case.
  4. That, following receipt of a proper Declaration of Disinterestedness by Mr. Bennyhoff, the Committee and joining creditors be given a reasonable time to object to Mr. Bennyhoff's Chapter 7 hiring and/or fees, or expressly allowed to object at the time of any Bennyhoff interim fee application.



1  
2 3. That if, on the other hand, Mr. Bennyhoff is a paraprofessional,

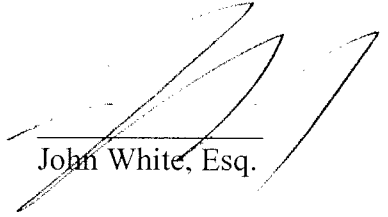
3 1. The Trustee be directed to pay Mr. Bennyhoff from his standard Trustee's fee  
4 rather than from the assets of this Estate.

5 2. The Trustee be directed to reimburse the estate all fees heretofore paid from the  
6 Estate in the Chapter 7 phase of this Case.

7 4. The Committee be allowed to continue to assist Trustee and the Court.

8 5. The Trustee keep the Committee informed as to relevant matters and consider the  
9 Committee's request to employ forensic accountant, denied without prejudice on  
10 November 19, 2010.

11 Respectfully submitted this 15th day of June, 2010.

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14 John White, Esq.  
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